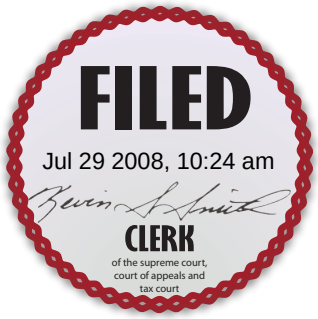

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IN THE
COURT OF APPEALS OF INDIANA

LAWRENCE GREGORY-BEY,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A04-0801-PC-4
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM MARION SUPERIOR COURT
The William T. Robinette, Judge Pro Tempore
Cause No.CR86-063E

July 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Lawrence Gregory-Bey appeals the denial of his petition for post-conviction relief. On appeal, Gregory-Bey raises three issues, which we restate as whether the post-conviction court properly concluded that newly discovered DNA evidence did not warrant a new trial and whether the post-conviction court properly denied Gregory-Bey relief on his claims of ineffective assistance of trial and appellate counsel. We affirm, concluding that the post-conviction court properly denied Gregory-Bey relief on his ineffective assistance of counsel claims and properly concluded that newly discovered DNA evidence did not warrant a new trial.

Facts and Procedural History

Our supreme court related the following facts on Gregory-Bey's direct appeal:

> On November 17, 1985, two men entered an Indianapolis McDonald's shortly after 7 a.m. One of the men was later identified as Lawrence Gregory-Bey.[1] After drinking several cups of coffee and waiting until two other customers left the building, the two men brandished handguns, ordered the five McDonald's crew members to the back of the store, and forced them to their knees. One of the robbers cleaned out the cash registers, and the other shoved the assistant store manager, Dewayne Bible, to the store's safe and forced him at gunpoint to open it. Between the money in the cash registers and the previous night's receipts in the safe, the robbers took a total of $1,069.95. Over Bible's objection, the robbers forced the six employees into the freezer, even denying Bible's request to turn the freezer off. The robbers then took the store keys from Bible and ordered one of the crew employees out of the freezer. Heroically, Bible asked the robbers to take him instead, so they substituted Bible for the employee and locked the five crew members inside the freezer.
>
> Approximately five minutes later the crew heard two or three gunshots. After the employees no longer could hear the robbers, they began to kick at the freezer door, and eventually freed themselves. Upon exiting they found the body of Dewayne Bible lying in a pool of blood on

[1] Both of the robbers were African-American. As compared to each other, however, one of the robbers was described as having relatively dark skin while the other was described as having relatively light skin. Gregory-Bey was ultimately identified as the dark-skinned robber.

> the stockroom floor with two closely spaced gunshot wounds to the rear base of his head.

Gregory-Bey v. State, 669 N.E.2d 154, 156-57 (Ind. 1996) (footnote omitted).[2] Gregory-Bey was arrested several months later and charged with the following offenses: felony murder; murder, a felony; conspiracy to commit robbery, a Class A felony; robbery, a Class A felony; six counts of criminal confinement, all Class B felonies; and carrying a handgun without a license, a Class A misdemeanor. The jury returned guilty verdicts on all charges, and, after entering judgments of conviction on each verdict, the trial court sentenced Gregory-Bey to an aggregate sentence of 281 years. On direct appeal, our supreme court vacated the felony murder and conspiracy to commit robbery convictions on double jeopardy grounds. Our supreme court also concluded that Gregory-Bey's convictions of murder and robbery as a Class A felony may have violated double jeopardy, but remanded the issue for the trial court to consider. On remand, the trial court lowered the robbery offense to a Class B felony, presumably due to double jeopardy concerns, and re-sentenced Gregory-Bey to an aggregate sentence of 201 years.

Gregory-Bey did not appeal the trial court's revised sentence. Instead, on May 18, 1998, Gregory-Bey filed a pro se petition for post-conviction relief, asserting, among other things, claims of ineffective assistance of trial and appellate counsel. These proceedings were apparently held in abeyance because, around the time our supreme court issued its decision, and due to the inordinate delay Gregory-Bey had encountered in pursuing state appellate remedies, the United States Court of Appeals for the Seventh

[2] Additional facts are also provided in Gregory-Bey's federal habeas corpus proceedings. See Gregory-Bey v. Hanks, 2000 WL 1909642 (S.D. Ind., Nov. 29, 2000), aff'd, 332 F.3d 1036 (7th Cir. 2003). As discussed in more detail in Part II.A.2., infra, Gregory-Bey's habeas proceedings primarily addressed the central issue at trial – whether the witnesses' identifications of Gregory-Bey as one of the robbers were reliable.

Circuit ordered a federal district court in the Southern District of Indiana to address the merits of a habeas corpus petition Gregory-Bey had filed on March 21, 1995. See Gregory-Bey v. Hanks, 1996 WL 394011, at *2 (7th Cir., July 11, 1996). Gregory-Bey's federal habeas proceeding primarily addressed the central issue at trial, namely, whether four of the surviving employees' – Angela Grinter, Urhonda Graham, Kathryn Blakely, and Patrice Hampton – identifications of Gregory-Bey as one of the robbers were reliable.[3] The district court concluded that all four identifications were reliable, and the Seventh Circuit affirmed. See Gregory-Bey v. Hanks, 2000 WL 1909642, at *5-20 (S.D. Ind., Nov. 29, 2000), aff'd, 332 F.3d 1036, 1045-51 (7th Cir. 2003).

With both his state direct appeal and federal habeas remedies having been foreclosed, Gregory-Bey renewed his efforts to obtain relief through post-conviction proceedings by filing an amended petition for relief on June 21, 2007, this time with benefit of counsel. The amended petition revised some of the specific allegations supporting the ineffective assistance of counsel claims and added a claim that newly discovered DNA evidence warranted a new trial.[4] On August 21, 2007, the post-conviction court conducted a hearing during which it received documentary evidence and heard testimony from a DNA technician, trial counsel, appellate counsel, and Gregory-Bey. On November 13, 2007, the post-conviction court entered findings of fact and conclusions of law denying relief. Gregory-Bey now appeals.

[3] The fifth surviving employee, Sonia Meads, did not identify Gregory-Bey as one of the robbers.

[4] The amended petition also alleged that newly discovered evidence concerning a juror's conduct during deliberations warranted a new trial, but Gregory-Bey does not appeal the post-conviction court's denial of relief with respect to this claim. The district court's decision in Gregory-Bey's federal habeas proceeding provides some discussion of this claim. See Gregory-Bey, 2000 WL 1909642, at *24-26.

Discussion and Decision

I. Standard of Review[5]

To obtain relief, a petitioner in a post-conviction proceeding bears the burden of establishing his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not defer to the post-conviction court's conclusions of law. Martin v. State, 740 N.E.2d 137, 139 (Ind. Ct. App. 2000). Moreover, when the petitioner appeals from a denial of relief, the denial is considered a negative judgment and therefore the petitioner must establish "that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." Stevens, 770 N.E.2d at 745.

II. Ineffective Assistance of Counsel

To establish a violation of the right to effective counsel as guaranteed by the Sixth Amendment, the petitioner must establish both prongs of the test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Wesley v. State, 788 N.E.2d 1247, 1252 (Ind. 2003). First, the petitioner must show counsel was deficient. Id. "Deficient" means that counsel's errors fell below an objective standard of reasonableness and were so serious that counsel was not functioning as "counsel" within the meaning of the Sixth

[5] Gregory-Bey correctly points out that the post-conviction court's findings of fact and conclusions of law are a verbatim reproduction of the findings and conclusions tendered by the State. Based on this reproduction, Gregory-Bey argues that "[t]his Court cannot be confident that the findings reflect the considered judgment of the [post-conviction court]." Appellant's Brief at 28 (citing Prowell v. State, 741 N.E.2d 704 (Ind. 2001)). Although this observation accurately characterizes our supreme court's observation in Prowell, see 741 N.E.2d at 709 ("[W]e do not prohibit the practice of adopting a party's proposed findings. But when this occurs, there is an inevitable erosion of the confidence of an appellate court that the findings reflect the considered judgment of the trial court."), to the extent Gregory-Bey invites this court to adopt a more relaxed standard of review, we note that our supreme court already has rejected such an invitation, see Wrinkles v. State, 749 N.E.2d 1179, 1188 (Ind. 2001), cert. denied, 535 U.S. 1019 (2002), but cf. Stevens v. State, 770 N.E.2d 739, 762 (Ind. 2002) (recognizing that "near verbatim reproductions may appropriately justify cautious appellate scrutiny"), cert. denied, 540 U.S. 830 (2003).

Amendment. Id. Second, the petitioner must show that counsel's deficiency resulted in prejudice. Id. Prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. We need not address whether counsel's performance was deficient if we can resolve a claim of ineffective assistance based on lack of prejudice. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002). The same standard of review applies to claims of ineffective assistance of trial counsel and claims of ineffective assistance of appellate counsel. Burnside v. State, 858 N.E.2d 232, 238 (Ind. Ct. App. 2006).

A. Trial Counsel

Gregory-Bey argues he received ineffective assistance of trial counsel because counsel failed to subpoena a fingerprint examiner, failed to object to an in-court identification, and failed to object to part of the State's closing argument. We will address each argument in turn.

1. Failure to Subpoena Fingerprint Examiner

Gregory-Bey argues counsel was ineffective because he failed to subpoena a fingerprint examiner. At trial, the State introduced evidence that shortly after the robbery, the investigating officers attempted to recover fingerprints from areas of the restaurant that the witnesses observed the robbers touching. These areas included the cash register drawers, the handle to the freezer door, the door knob to the supply room, a sink in the employee area of the restaurant, the table at which the robbers had been sitting, and several items that were on the table. One of the State's fingerprint examiners testified that two of the fingerprints removed from these areas were of sufficient quality

to make a comparison. One of these fingerprints, which was recovered from an ashtray on the table, was positively identified as Hampton's, and the other, which was removed from the supply room doorknob, was excluded as Gregory-Bey's. In effort to further underscore the absence of fingerprint evidence tying his client to the scene, Gregory-Bey's counsel moved to introduce a letter from a fingerprint examiner with the Illinois State Police stating that his review of the fingerprints revealed three that were of sufficient quality to make a comparison and that "[a]ll three suitable impressions were compared to the inked fingerprint and palmprints bearing the name Lawrence Gregory with negative results." Appellant's App. at 409. The trial court, however, excluded the letter based on the State's hearsay objection, and Gregory-Bey's counsel did not move for a continuance to subpoena the fingerprint examiner. At the post-conviction hearing, Gregory-Bey introduced the letter and an affidavit from the fingerprint examiner stating that his testimony would have been consistent with the statements in the letter.

Gregory-Bey argues that counsel was deficient for failing to subpoena the fingerprint examiner because the examiner's testimony would have rebutted the State's characterization of the fingerprint evidence as neither inculpating nor exculpating Gregory-Bey and that the deficiency resulted in prejudice because it would have undermined the witnesses' identifications of Gregory-Bey as one of the robbers. Putting to the side whether counsel was deficient for failing to subpoena the fingerprint examiner, we note initially that we are skeptical of Gregory-Bey's prejudice argument because the fingerprint examiner's letter and affidavit do not state the areas from which the three identifiable fingerprints were removed. Although we recognize that this lack of

explanation is due to the fingerprint examiner's inability to recall the specifics of Gregory-Bey's case, see id. at 411 (fingerprint examiner's affidavit stating that he has no independent recollection of Gregory-Bey's case and that his refreshed recollection is based on the letter), it is nevertheless Gregory-Bey's obligation to present this court with evidence establishing what the critical points of the examiner's testimony would have been in order for us to address whether the post-conviction court properly denied him relief,[6] cf. Lowery v. State, 640 N.E.2d 1031, 1047 (Ind. 1994) ("When ineffective assistance of counsel is alleged and premised on the attorney's failure to present witnesses, it is incumbent upon the petitioner to offer evidence as to who the witnesses were and what their testimony would have been."), cert. denied, 516 U.S. 992 (1995); Fugate v. State, 608 N.E.2d 1370, 1373 (Ind. 1993) (concluding the petitioner could not establish that counsel was ineffective for failing to subpoena a witness in part because the petitioner did not provide an affidavit showing what the witness's testimony would have been).

Notwithstanding the lack of testimony on this point, and as far as we can tell from our review of the record, we note that the fingerprints were removed from areas that were not areas that only the robbers could have accessed. To the contrary, they were fairly commonplace areas of a public restaurant where employees or customers (or both) could have left fingerprints. We therefore disagree with Gregory-Bey that the Illinois State

[6] Gregory-Bey attempts to overcome the absence of evidence on this point by claiming that his counsel's cross-examination of the State's fingerprint examiner implicitly established that one of the fingerprints identified by the Illinois State Police fingerprint examiner was removed from the table at which the robbers were sitting. See Appellant's Reply Brief at 14-15 (citing Transcript of Tr. at 1516-17). The portion of the testimony Gregory-Bey cites indicates that the State's fingerprint examiner testified that one of the fingerprints removed from the table was of insufficient quality to make a comparison; it does not give any indication that the Illinois State Police fingerprint examiner identified this fingerprint as one of the three that was not Gregory-Bey's.

Police fingerprint examiner's testimony would have undermined the witnesses' identifications. Instead, we think such testimony would have merely been consistent with what the fingerprint evidence generally established: although some of the identifiable fingerprints were not Gregory-Bey's, the other, unidentifiable fingerprints neither inculpated nor exculpated him as one of the robbers. As such, we are not convinced Gregory-Bey has demonstrated that the Illinois State Police fingerprint examiner's testimony probably would have produced a different result, and it therefore follows that counsel was not ineffective for failing to subpoena him.

2. Failure to Object to In-Court Identification

Gregory-Bey argues counsel was ineffective because he failed to object to Grinter's in-court identification of Gregory-Bey as one of the robbers. To establish the deficiency prong of ineffective assistance, Gregory-Bey must show that an objection would have been sustained. See Whitener v. State, 696 N.E.2d 40, 44 (Ind. 1998). To show that an objection would have been sustained, Gregory-Bey must demonstrate that the identification procedures were unduly suggestive and that, based on the totality of the circumstances, the identification was not sufficiently reliable to prevent misidentification.[7] See United States v. Traeger, 289 F.3d 461, 474 (7th Cir. 2002), cert. denied, 537 U.S. 1020 (2002); Harris v. State, 716 N.E.2d 406, 410 (Ind. 1999).

The problem with Gregory-Bey's deficiency argument is that the Seventh Circuit already affirmed the district court's decision that Grinter's identification, as well as the identifications of the other three witnesses, "were not so grave as to require exclusion of

[7] The foregoing is the federal constitutional due process standard for admissibility of eyewitness identification. Gregory-Bey does not argue that Grinter's identification or any other witnesses' violated rights guaranteed under the Indiana Constitution.

the identification testimony as a matter of federal constitutional law."[8] Gregory-Bey, 2000 WL 1909642, at *20; see also Gregory-Bey, 332 F.3d at 1051 (affirming the district court as to this issue); but see id. at 1051-58 (concluding that Gregory-Bey's convictions should be reversed because all four identifications were unduly suggestive and unreliable) (Williams, J., dissenting). Although the Seventh Circuit's decision does not technically raise the issue of res judicata, cf. Ben-Yisrayl v. State, 738 N.E.2d 253, 259 (Ind. 2000) (concluding res judicata applied to bar the petitioner from raising a claim of ineffective assistance of trial counsel in his post-conviction proceeding because, on direct appeal, he "raised, and this Court considered and rejected, a claim of ineffective assistance of trial counsel"), cert. denied, 534 U.S. 1164 (2002), we are nevertheless faced with the decision of a court of competent jurisdiction that has already addressed the underlying issue upon which Gregory-Bey's ineffective assistance of counsel claim is based.

In such cases, our supreme court has acknowledged that a reviewing court has the power to revisit prior decisions of a coordinate court if the prior decision is "clearly erroneous and would work manifest injustice," but has cautioned that a reviewing court should "be loathe to do so in the absence of extraordinary circumstances." State v. Huffman, 643 N.E.2d 899, 901 (Ind. 1994). We have reviewed the decisions from

[8] We note as an aside that the evidence presented, as well as the analysis undertaken, relating to the reliability of the witnesses' identifications was substantial. At a hearing on Gregory-Bey's motion to suppress the witnesses' identifications, Gregory-Bey's counsel, having previously deposed the witnesses and several of the investigating officers, extensively examined the witnesses and the officers, generating over 350 pages of testimony and admitting around a dozen exhibits into evidence. Extensive examination also occurred at trial, generating over 900 pages of testimony, a significant portion of which addressed the witnesses' identifications. In Gregory-Bey's federal habeas proceedings, both the district court and the Seventh Circuit addressed this record in substantial detail in determining whether the witnesses' identifications were sufficiently reliable. See Gregory-Bey, 332 F.3d at 1045-51; Gregory-Bey, 2000 WL 1909642, at *5-20.

Gregory-Bey's federal habeas proceedings and the extensive pre-trial and trial record upon which the district court's and Seventh Circuit's decisions are based, see supra, note 8, and conclude that although the reliability of the witnesses' identifications is one over which reasonable minds can differ (as evidenced by the dissenting opinion, see Gregory-Bey, 332 F.3d at 1051-58), the Seventh Circuit's conclusion does not rise to the level of clear error so as to warrant corrective action by this court. As such, we conclude Gregory-Bey has not established that an objection to Grinter's in-court identification would have been sustained, and it follows that counsel was not deficient. Thus, Gregory-Bey did not receive ineffective assistance based on counsel's failure to object to Grinter's in-court identification.

3. Failure to Object to the State's Closing Argument

Gregory-Bey argues counsel was ineffective because he failed to object to a part of the State's closing argument where the prosecuting attorney quoted from a passage of Justice White's partial dissent in United States v. Wade, 388 U.S. 218, 251 (1967). The passage the prosecuting attorney read[9] suggested that unlike prosecutors and police

[9] The entirety of the prosecuting attorney's quoted passage is as follows:

> [L]aw enforcement officers have an obligation to convict the guilty and make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for ascertainment of true facts surrounding the commission of the crime. To this extent our so-called adversary system is not adversary at all, nor should it be. The Defense Counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing a conviction of the innocent. But absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. And the State has the obligation to present the evidence. The Defense Counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police or reveal any confidences of his client or furnish any other information to help the Prosecutor's case. If he can confuse a witness, even a truthful one, or make him appear at disadvantage [sic], unsure or indecisive that will be his normal course. Our interest in not convicting the innocent permits Defense Counsel to put the State to its proof, to put the State's case in the worst possible light regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which Defense Counsel must observe. But more often than not Defense Counsel will attempt to destroy a witness who he thinks is lying. In this respect it's part of our adversary system and it's part of the duty imposed on most

officers, whose duty it is to seek the true perpetrators of crimes, a criminal defense attorney's duty is to serve his client and, by implication, undermine the efforts of prosecutors and law enforcement officers regardless of whether the defense attorney's client is in fact innocent or guilty. To that end, after reading the passage, the prosecuting attorney asked the jury rhetorically why Gregory-Bey's counsel asked the witnesses so many questions concerning their identifications, further implying that such questions were not designed to seek the "truth," but rather to obscure it.[10]

We reiterate that to establish counsel was deficient, Gregory-Bey must show that an objection to the prosecuting attorney's reading of the passage would have been sustained. See Whitener, 696 N.E.2d at 44. Gregory-Bey has not provided us with any authority indicating that, at the time of his trial in November 1986, it was per se impermissible for a prosecuting attorney to read from the Wade dissent during closing argument. To the contrary, at that time it had been "firmly established by our supreme court that it is permissible for a prosecutor to read this passage during closing argument."[11] Roller v. State, 602 N.E.2d 165, 169 (Ind. Ct. App. 1992) (citing, among other cases, Abercrombie v. State, 478 N.E.2d 1236, 1238-39 (Ind. 1985); Johnson v.

> honorable defense counsels, we constantly require conduct which in many instances has little, if any, relation to the search for truth.

Tr. of Trial at 1635-36 (quoting, with minor grammatical differences, Wade, 388 U.S. at 256-58 (White, J., dissenting in part and concurring in part)).

[10] These statements were tempered somewhat by the prosecuting attorney's remarks that he "was not pointing [his] finger" at Gregory-Bey's counsel and that he believed Gregory-Bey's counsel had "done his job, quite honestly." Id. at 1636-37.

[11] Quoting from the Wade dissent has since fallen into disfavor, see Miller v. State, 623 N.E.2d 403, 408 (Ind. 1993), but our supreme court has never held that such conduct by a prosecutor is per se impermissible, reasoning instead that the propriety of such conduct should be entrusted to the trial court's judgment based on the particular facts and circumstances of the case, see Coy v. State, 720 N.E.2d 370, 373 (Ind. 1999) (observing that quoting from the Wade dissent may be improper if it 1) portrays prosecutors as "ministers of justices" and 2) denigrates defense attorneys, but emphasizing that determining whether this test has been met generally "is a call best placed in the hands of trial judges").

State, 475 N.E.2d 17, 19 (Ind. 1985); Hubbard v. State, 262 Ind. 176, 182, 313 N.E.2d 346, 350 (1974)). In light of this authority, we are not convinced Gregory-Bey has established that the evidence leads unerringly and unmistakably to a conclusion that an objection would have been sustained. Thus, counsel's performance was not deficient, and it follows that Gregory-Bey did not receive ineffective assistance based on counsel's failure to object to the prosecuting attorney's quoting from the Wade dissent during closing argument.

B. Appellate Counsel

Gregory-Bey argues he received ineffective assistance of appellate counsel because, on direct appeal, counsel failed to argue that the trial court improperly denied Gregory-Bey's motion to suppress the witnesses' identifications of him as one of the robbers and failed to argue that the prosecuting attorney's quoting from the Wade dissent during closing argument constituted fundamental error. Our standard of review for claims of ineffective assistance of appellate counsel is the same as claims of ineffective assistance of trial counsel, see Burnside, 858 N.E.2d at 238, but our test for determining whether appellate counsel is deficient is described differently: to satisfy this prong, the petitioner must show that 1) the unraised issue was significant and obvious from the record and 2) the unraised issue is clearly stronger than the issues that were presented. Bieghler v. State, 690 N.E.2d 188, 194 (Ind. 1997), cert. denied, 525 U.S. 1021 (1998). However, because we have already determined that Gregory-Bey's trial counsel was not ineffective on the basis of the same underlying claims,[12] see supra, Parts II.A.2. and 3.,

[12] We recognize that Gregory-Bey's ineffective assistance of trial counsel claim challenges only counsel's failure to object to Grinter's in-court identification, while his ineffective assistance of appellate counsel claim

we conclude that Gregory-Bey also cannot establish that his appellate counsel was ineffective for failing to make the same arguments on direct appeal.

III. Newly Discovered DNA Evidence

Gregory-Bey argues the post-conviction court improperly concluded that newly discovered DNA evidence did not warrant a new trial. On April 1, 2006, the trial court granted Gregory-Bey's petition to have an independent laboratory conduct DNA testing on several items admitted into evidence at trial, specifically a coffee cup, coffee lid, stir stick, and two cigarette butts that were recovered from the table at which the robbers had been sitting, as well as another cigarette butt that was recovered from the floor near the safe. At the post-conviction hearing, a technician from the independent laboratory testified that he was unable to obtain a sufficient sample of DNA for testing from the coffee lid, stir stick, and cigarette butt recovered from the floor, but was able to obtain sufficient samples for testing from the coffee cup and the two cigarette butts recovered from the table (labeled by the technician as the "5-1" cigarette and the "5-2" cigarette). The technician also testified that the DNA samples recovered from the coffee cup and the 5-1 cigarette were "consistent with originating from the same male source" and that he excluded Gregory-Bey as that source. Transcript of Post-Conviction Hearing at 25. Regarding the 5-2 cigarette, the technician testified that it contained a mixed sample of DNA from at least two males and that Gregory-Bey was excluded as the source. The post-conviction court concluded that this evidence did not warrant a new trial in part

challenges counsel's failure to argue the impropriety of all four witnesses' identifications on direct appeal. This distinction, however, does not require that we analyze Gregory-Bey's appellate claim differently, because the Seventh Circuit's decision analyzed all four witnesses' identifications and concluded they were sufficiently reliable, see supra, Part II.A.2., and we base our conclusion on that decision.

because it "does not directly contradict any pertinent evidence, nor would it change anything to the defense that was previously presented." Appellant's Appendix at 152.

A petitioner is entitled to relief, including a new trial, if post-conviction DNA test results are "favorable" to the petitioner. Ind. Code § 35-38-7-18. This court has interpreted "favorable" to mean "a reasonable probability that the verdict . . . would have been different had [the DNA test results] been available at trial."[13] Greenwell v. State, 884 N.E.2d 319, 326 (Ind. Ct. App. 2008). Gregory-Bey argues there is a reasonable probability the DNA test results would have produced a different result at trial because "[t]he results exclude him as one of the two men seated at the table where the witnesses consistently said the robbers sat waiting for the restaurant to empty." Appellant's Br. at 37-38. The State counters that the DNA test results would not have produced a different result because "[a]lthough [Gregory-Bey] was excluded as the source of the DNA, this did not exclude him from participation in the crime." Appellee's Brief at 16.

The testing results from the coffee cup and the 5-1 cigarette do not create a reasonable probability that the jury's verdicts would have been different because it is plausible that the other robber was the source of the DNA that was recovered from these items. Both Hampton's and Grinter's transcribed statements, which they made the day of

[13] The parties finished their briefing after this court handed down its opinion in Greenwell and therefore analyze this issue under the nine-element common law test for newly discovered evidence, see Carter v. State, 738 N.E.2d 665, 671 (Ind. 2000), focusing primarily on the final element of the test, namely, the requirement that the evidence "will probably produce a different result at retrial," id. Because our legislature has created a statutory framework specifically designed to address whether to grant relief on the basis of post-conviction DNA evidence, we will examine the issue within that framework, but note that we perceive no difference between the common law's requirement that the evidence "will probably produce a different result at retrial," Carter, 738 N.E.2d at 671, and the statutory requirement, as interpreted in Greenwell, that the evidence create "a reasonable probability that the verdict . . . would have been different had [the DNA test results] been available at trial," 884 N.E.2d at 326.

the robbery, indicate that both of the robbers were drinking coffee.[14] See Defendant's Exhibit A, at 3 (November 17, 1986, Suppression Hearing, appended to Transcript of Trial at 373) (Hampton's statement that the robbers "was sittin [sic] there and all they kept drinking was coffee . . . ."); Defendant's Ex. E, at 4 (November 17, 1986, Suppression Hearing, appended to Transcript of Tr. at 388) (Grinter's statement that the robbers were "sittin [sic] in the lobby they ordered and ate and they kept ordering coffee"). These statements are consistent with Hampton's testimony at the November 17, 1986, suppression hearing, see tr. of trial at 568 ("Q. You just essentially knew that there were two (2) black males sitting there then, is that right? A. Right, drinking coffee, smoking cigarettes. Q. Pardon me? A. Drinking coffee, smoking cigarettes. Q. Okay. And then . . . you later saw the . . . dark skinned one go up to get a cup of coffee, is that right? A. Right."), as well as the trial testimony of Harry Johnson, a customer who left the restaurant prior to the robbery, see id. at 769 (Q. Okay. And . . . what were [the robbers] doing there at that table? A. Well they was [sic] . . . drinking coffee and . . . talking, whispering. . . ."),[15] That both robbers were smoking cigarettes is supported by Hampton's trial testimony:

Q. . . . And did you see [the robbers] smoking cigarettes?

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[14] Hampton and Grinter were the only surviving employees who testified that they observed the robbers prior to the robbery; Hampton was washing windows in the dining area, see tr. of trial at 1264, while Grinter actually served coffee to the dark-skinned robber after he ordered from the counter, see id. at 1012. The remaining surviving employees were working in the employee area of the restaurant prior to the robbery. See id. at 972-73, 1093, 1180.

[15] Grinter's suppression hearing testimony does not address her observations prior to the robbery, and although her trial testimony fails to indicate that both robbers were drinking coffee, it does not contradict the statement she made on the day of the robbery or otherwise affirmatively establish that the dark-skinned robber was the only robber who drank coffee. See id. at 1012 ("Q. Okay. And where did the dark skinned person come to when he made that [(coffee)] order? A. In front of the counter where I was standing. Q. So you were right across the counter from him when he ordered then? A. Yes. Q. Okay. How about the light skinned guy? Did you take any orders from him that morning? A. No. Q. Do you know who waited on him? A. No.").

A. Yes.
Q. Was the black one smoking cigarettes?
A. I don't have no idea [sic]. The cigarette, in other[]words the cigarette was lit but it was laying in the ashtray when I was outside doing the windows.
Q. Oh, so you don't know which one was smoking the cigarette then?
A. No.

Id. at 1303. Although this testimony conflicts with Hampton's suppression hearing testimony mentioned above that both of the robbers were smoking cigarettes, it does not affirmatively establish that the dark-skinned robber was the only robber smoking a cigarette. As such, this testimony, coupled with Hampton's and Grinter's statements and the other testimony mentioned above,[16] indicates the light-skinned robber was drinking coffee and smoking cigarettes, which in turn supports a reasonable inference that this robber was the source of the DNA that was recovered from the coffee cup and the 5-1 cigarette. Thus, we conclude that the DNA test results from these items do not create a reasonable probability that the jury's verdicts would have been different.

Whether the DNA recovered from the 5-2 cigarette creates a reasonable probability that the jury's verdicts would have been different is a closer call because the technician testified that the 5-2 cigarette contained a mixed sample of DNA from at least two males and that Gregory-Bey was excluded as the source. For reasons stated above, a reasonable inference is that the light-skinned robber was the source of one part of the sample, but this still leaves at least one other DNA sample that is not Gregory-Bey's. Gregory-Bey claims that the other part of the DNA sample necessarily was the dark-

[16] Although we do not rely on it, we note that Fred Jackson, the lead detective in the case, testified at trial that shortly after arriving at the restaurant, one of the responding officers told him the surviving employees reported that "two (2) black males . . . had entered the store and . . . they had sat for awhile in a corner table and had drank coffee for approximately an hour." Id. at 1347.

skinned robber, and describes the State's alternative explanation that the presence of additional DNA on the 5-2 cigarette may have been the result of improper handling by investigators as an "implausible assertion." Appellant's Reply Br. at 3. Putting to the side whether the State's explanation is plausible, Gregory-Bey's claim that the dark-skinned robber was the source of the other part of the DNA sample is more of an assumption than it is a reasonable inference drawn from the evidence, and overlooks that the lab technician testified the sample did not contain exactly two sources, but at least two sources. See Transcript of P-C Hearing, at 28 ("Q Now, with Item Number 5.2, you've indicated that there would be at least two contributors, correct? A Yes. Q Okay. Possible there is more than two? A It's possible. Q And you have no idea who those contributors would be is that correct? A That's correct."). On appeal from the denial of post-conviction relief, Gregory-Bey is obligated to show that "the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court," Stevens, 770 N.E.2d at 745; see also id. ("In other words, the defendant must convince this Court that there is no way within the law that the court below could have reached the decision it did." (emphasis in original.)), and we are not convinced Gregory-Bey has overcome this high burden. Instead, we view the mixed sample of DNA from the 5-2 cigarette as consistent with the other physical evidence recovered from the restaurant in that it neither inculpated nor exculpated Gregory-Bey as one of the dark-skinned robbers. See Pinkins v. State, 799 N.E.2d 1079, 1092 (Ind. Ct. App. 2003) (concluding the petitioner was not entitled to relief on the basis of DNA test results in part because such results "showed that [the petitioner] could be neither included

nor excluded as one of [the victim's] assailants"), trans. denied; cf. Williams v. State, 808 N.E.2d 652, 660 (Ind. 2004) (concluding DNA test results did not warrant vacation of convictions and death sentence in part because "what the DNA test results seem to show is not that much different from what was presented at trial"). As such, the DNA test results do not create a reasonable probability that the jury's verdicts would have been different if they were admitted into evidence at trial, and it therefore follows that the trial court properly denied Gregory-Bey relief on this issue.

Conclusion

The post-conviction court properly denied Gregory-Bey relief on his claims of ineffective assistance of trial and appellate counsel and properly concluded that newly discovered DNA evidence did not warrant a new trial.

Affirmed.

BAKER, C.J., and RILEY, J., concur.